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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ART MUNOZ DEHARO, Defendant and Appellant.	B179829 (Los Angeles County Super. Ct. No. KA066514)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Art Munoz Deharo, also known as Arturo De Haro, appeals from the judgment entered upon his convictions by jury of unlawful driving or taking a special vehicle (Veh. Code, § 10851, subd. (b), count 1), grand theft firearm (Pen. Code, § 487, subd. (d)(2), count 4),[1] and possession of a firearm by a felon (§ 12021, subd. (a)(1), count 6).[2] The trial court found that appellant had suffered a prior felony strike within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), a prior serious felony within the meaning of section 667, subdivision (a)(1) and a prior prison term within the meaning of section 667.5, subdivision (b). It sentenced appellant to state prison for 31 years to life, which included a five-year enhancement under section 667, subdivision (a) on count 4. Appellant contends that the trial court erred in imposing the five-year enhancement on count 4 because it was neither pled nor proved with respect to that count.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[3]

On May 19, 2004, near 10:30 p.m., appellant took a marked Los Angeles County Sheriff's car that was left with the engine running and key in the ignition. There was a shotgun inside the car. While driving the car at Basetdale Avenue, near the City of Industry, appellant fired a shotgun or rifle. At a Wal-Mart parking lot, he approached David Gonzalez, who was in his car leaving work. Appellant asked to see Gonzalez's identification. Gonzalez assumed appellant was a police officer. Gonzalez handed him his driver's license and left his wallet on the seat. Appellant told Gonzalez to get out of

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The jury found appellant not guilty of grand theft person (§ 487, subd. (c), count 2), petty theft (§ 484, subd. (a), a lesser offense in count 2), evading an officer, willful disregard (Veh. Code, § 2800.2, subd. (a), count 3), and evading an officer (Veh. Code, § 2800.1, subd. (a), a lesser offense in count 3). The jury deadlocked on count 5, discharge of a firearm with negligence (§ 246.3) and the trial court declared a mistrial on that count, which was ultimately dismissed "due to plea negotiation."

[3] We provide a truncated factual statement, as the limited issue presented on appeal is not dependent on the underlying facts.

the car and sit on the curb, while appellant looked in the front and back seats of Gonzalez's car. Appellant then came over to Gonzalez, returned his driver's license, and told Gonzalez that he was intoxicated and should have a friend drive him home. Appellant got back into the police car and sped away. When Gonzalez got back into his car, his wallet with $229 was missing.

At 2:30 a.m., on May 20, 2004, California Highway Patrol officers engaged in a high speed chase after the missing sheriff's car. Appellant was arrested and admitted to police officers that he had stolen the car. He said he did not remember firing the gun, but the shotgun was found in appellant's room.

Appellant was convicted of unlawfully driving a special vehicle, grand theft firearm, and possession of a firearm by a felon. The jury failed to reach a verdict on count 5, and the trial court declared a mistrial on that count. In connection with count 5 the amended information alleged that appellant had suffered several prior serious felony convictions within the meaning of section 667, subdivision (a). The trial court sentenced appellant to 25 years to life on count 4, plus an additional consecutive five years on that count for the prior serious felony enhancement, and an additional one year for the prior prison term. The court dismissed count 5.

DISCUSSION

Appellant contends that the trial court erred in imposing a five-year prior serious felony enhancement on count 4 because that enhancement was neither pled nor proved with respect to that count. He argues that imposition of the enhancement deprived him of due process under the United States Constitution, was precluded by the separation of powers doctrine because the prosecution is responsible for deciding what charges and enhancements to allege, and deprived him of the right to counsel under the Sixth Amendment to the United States Constitution because it precluded his attorney from accurately advising him regarding plea negotiations. We find his contentions to be without merit.

Due Process

Procedural due process requires adequate notice and opportunity to be heard. (U.S. Const., Amends. 5, 14; *Albright v. Oliver* (1994) 510 U.S. 266, 295, fn. 8 [“‘An essential principle of due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case”’”].) In the criminal context, this means that the defendant must be advised of the charges against him or her in order that the defendant may have a reasonable opportunity to prepare and present a defense and not be surprised by evidence at trial. (*People v. Thomas* (1987) 43 Cal.3d 818, 823.)

Enhancements must be specifically pled and proven. Section 1170.1, subdivision (e) provides, “All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” Appellant argues that the failure to allege the prior serious felony enhancement in connection with count 4, on which it was imposed, denied him notice and opportunity to be heard. We disagree.

Due process is satisfied as long as the information apprises the defendant of the potential of the enhanced penalty and alleges all of the necessary facts to establish its applicability. (*People v. Sok* (2010) 181 Cal.App.4th 88, 96, fn. 8.) “[W]here the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement, modification of the judgment for a misstatement of the underlying enhancement statute is required only where the defendant has been misled to his prejudice. [Citations.]” (*People v. Neal* (1984) 159 Cal.App.3d 69, 73–74 (*Neal*), quoted and cited with approval in *People v. Thomas, supra,* 43 Cal.3d at pp. 830–831.) Where the information informs the defendant of the specific conduct alleged and that the accused cannot show that preparation of his or her defense would have been altered absent the error, no modification of the judgment is required. (*Neal, supra,* at pp. 72–73.)

Here, the information alleged a section 667, subdivision (a) prior serious felony enhancement in connection with count 5. This put appellant on notice that if he had a

defense to this enhancement, he should present it. The record does not support any inference that appellant was misled to his prejudice. He had the same incentive to defend the enhancement alleged on count 5 as he would have had had it been alleged on count 4. Count 5 was not dismissed until the end of the sentencing hearing. Consequently, appellant had notice of the enhancement and the opportunity to defend against it. There was neither surprise nor unfairness in applying it to count 4.

Neal is instructive. In that case, the defendant was charged with various sex crimes as well as an enhancement for using a deadly weapon, specified in the information as a violation of section 12022, subdivision (b). After the jury found the enhancement to be true, the trial court sentenced the defendant under section 12022.3, a more specific enhancement provision which applies only to enumerated violent sex offenses and carries a three-year term rather than the one-year term of section 12022, subdivision (b). (*Neal, supra,* 159 Cal.App.3d at p. 72.) The issue on appeal was whether misstating the code section required modification of the judgment to reduce the enhancement to the one pleaded. The Court of Appeal held that it did not, concluding that "where the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement, modification of the judgment for a misstatement of the underlying enhancement statute is required only where the defendant has been misled to his prejudice." (*Id.* at p. 73.)

Here too, appellant had notice of the prior serious felony enhancement and the facts supporting it. Unlike in *Neal*, appellant was not subjected to a more severe punishment. He received the same five-year sentence in connection with count 4 that he could have received with count 5.

People v. Riva (2003) 112 Cal.App.4th 981, 1000–1003 (*Riva*) is also informative. The Court of Appeal in that case held that the failure to plead the firearm enhancement in section 12022.53 as to the count on which it was ultimately imposed did not violate the defendant's statutory or constitutional right to adequate notice. (*Riva, supra,* at p. 1000.) The court observed that the statute in that case, like sections 667, subdivision (a) and 1170, subdivision (e) here, did not specify where in the information the enhancement had

to be pled. The *Riva* court stated: "Had the Legislature intended an enhancement . . . be specifically pled as to each count the prosecution sought to enhance, it knew how to say so clearly. Former sections . . . 12022 and 12022.5 respectively, contained such a provision." (*Riva, supra,* at pp. 1002–1003, fn. omitted.) Thus, the literal requirement of pleading and proof of the enhancement (§ 1170, subd. (e)) was satisfied here by alleging the prior serious felony enhancement in count 5 of the information.

Appellant claims that *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) "is dispositive of the case at bar." We disagree. In *Mancebo*, the information alleged firearm use as a basis for imposition of the one-strike sentence enhancement under section 667.61. But at the sentencing hearing, in order to be able to use the firearm use as an enhancement without violating the dual use prohibition, the trial court substituted a multiple-victims circumstance which had not been alleged by statute number or as a circumstance for imposition of section 667.61. The Supreme Court reversed the sentence, finding that section 667.61 required the multiple victim circumstance to be pled and proved. (*Mancebo, supra,* at pp. 743–744.) It held that the trial court erred in sentencing when it used an unpled multiple victim circumstance to support a sentence under the one-strike law (§ 667.61) in order that a pled and proved gun-use allegation could be used to impose additional sentence enhancements. (*Mancebo, supra,* at pp. 740, 743, 745, 754.)

This case can be distinguished from *Mancebo.* The prior serious felony enhancement here was specifically pled, proved and subject to defense at trial, although alleged as to a different count. In *Mancebo*, neither the multiple victim circumstance nor the relevant code section was alleged as a basis for the one-strike enhancement. *Mancebo* thus stands for the limited proposition that a defendant is entitled to notice of the specific facts that will be used to support an enhanced sentence. Facts alleged and proved only as part of the substantive crime cannot later be used to support a sentencing enhancement. (*Mancebo, supra,* 27 Cal.4th at p. 749.) Here, unlike in *Mancebo*, the prior serious felony enhancement was imposed based on facts specifically pled and proved as enhancements.

Appellant argues that his attorney was unable to adequately negotiate a plea arrangement because the prior serious felony enhancement was alleged as part of count 5, which was weaker than count 4 and was ultimately mistried. If he had "known at the outset of trial that the enhancement could be imposed on count four, appellant may have been more inclined to plea, or may have more strenuously fought the charges against him . . . ."

Assessing the strength of the prosecution's case is not the precise science appellant suggests. His argument is premised upon pure speculation. Counsel knew at all relevant times that there was a five-year enhancement alleged which could impact the maximum term that appellant could receive which had to be considered in any plea evaluation.

Separation of Powers

The decision as to the appropriate charges is a matter of prosecutorial discretion, which is "founded upon constitutional principles of separation of powers and due process of law." (*People v. Valli* (2010) 187 Cal.App.4th 786, 801.) But the exercise of sentencing discretion is fundamentally and inherently a judicial function. (*People v. Thomas* (2005) 35 Cal.4th 635, 640.) The prosecutorial discretion before and after the filing of charges is critically distinct. After charges are filed, separation of powers precludes the prosecutor from controlling the legislatively specified sentencing choices available to the court. (*Id.* at p. 641.) For example, a statute conditioning a magistrate's ability to determine that a charged wobbler offense is to be tried as a misdemeanor on the prosecutor's approval is a violation of the separation of powers. (*Esteybar v. Municipal Court* (1971) 5 Cal.3d 119.) "When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of the charge becomes a judicial responsibility." (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 517.)

The trial court here acted within its discretionary authority in imposing sentence. This included the authority to apply the prior serious felony enhancement to count 4. The trial court did not limit the prosecutor's charging discretion, but merely determined the lawful sentence it could impose. Additionally, when the trial court imposed the prior serious felony enhancement on count 4, the prosecutor did not object. We construe this

silence to reflect the People's consent to the trial court's imposition of the enhancement as to count 4.

Ineffective assistance of counsel

Appellant argues that because the information only alleged the prior serious felony enhancement in connection with a weak count 5, his attorney could not provide effective assistance to appellant because counsel could not properly assess whether to accept a plea bargain. "A defense attorney who relied on the prosecution's charging decisions in advising a client regarding plea agreements would be rendering ineffective assistance of counsel if a court could ultimately disregard those charging allegations."

In support of this argument, appellant relies principally on *In re Alvernaz* (1992) 2 Cal.4th 924 (*Alvernaz*), which held that the pleading and plea bargaining stage of a criminal proceeding is a critical part of the criminal process and a time when a defendant is entitled to the effective assistance of counsel. (*Id.* at p. 933.) Where ineffective assistance of counsel causes a defendant not to accept a plea bargain, like when such defective representation leads to the acceptance of a plea bargain, it may give rise to a claim of ineffective assistance of counsel, even if the defendant subsequently receives a fair trial. (*Id.* at p. 934.)

The usual standards of ineffective assistance apply to the rejection of a plea bargain: (1) defective performance by counsel, and (2) but for counsel's deficient performance, there would have been a more favorable result to the defendant. (*Alvernaz, supra,* 2 Cal.4th at pp. 936–937.) In the context of rejecting a plea bargain, counsel's duty is to accurately communicate to the client the terms of the offer and the consequences of rejecting it, including the maximum and minimum sentences which may be imposed if convicted. (*Id.* at p. 937.) Simple misjudgment of the strength of the prosecution's case, the chances of acquittal, or the sentence the defendant is likely to receive will not, without more, give rise to a claim of ineffective assistance of counsel. (*Ibid.*)

The record on the appeal before us is insufficient to permit assessment of whether appellant's counsel performed defectively with regard to the plea negotiation process. It

does not reflect what plea offers, if any, were made, and what advice trial counsel gave to appellant. For that reason, claims of ineffective assistance of counsel must generally be raised in a petition for writ of habeas corpus based on matters outside the record on appeal. (*People v. Salcido* (2008) 44 Cal.4th 93, 172.) Moreover, because the five-year serious felony prior was alleged, defense counsel was able to factor it into his case evaluation. Counsel's performance is assessed by the pleading and facts known to counsel at the time of plea offers, not based on what may have happened during trial or sentencing. Consequently, appellant has failed to demonstrate that there was defective performance by his counsel.

Appellant has similarly failed to demonstrate that he would have obtained a more favorable result but for the ineffective performance of counsel. There is nothing in the record to suggest that but for his counsel's defective performance, appellant would have accepted a plea offer. (*Alvernaz, supra,* 2 Cal.4th at p. 937.)[4]

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

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[4] Given our conclusion, we need not decide whether, as respondent argues, the parties had negotiated the imposition of the prior serious felony enhanced on count 4 in return for the dismissal of count 5.